

ENDANGERED SPECIES ACT: WHAT'S NEW!

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The Fish and Wildlife Service (FWS) of the Department of the Interior and the National Marine Fisheries Service (NMFS) of the Department of Commerce are jointly responsible under the Endangered Species Act (ESA) of 1973 (as amended) for protecting and conserving wildlife and plants from extinction. These agencies have recently modified some of their policies in order to help them better fulfill their responsibilities. These recent changes are detailed in this update.

NMFS Proposes Definition of "Harm"

Section 9 of the ESA makes it illegal to "take" an endangered species of fish or wildlife. The word "take" as defined in the ESA includes the term "harm." To eliminate confusion, the FWS issued a regulation which states that the term "harm" specifically includes any act which actually kills or injures wildlife. Significant habitat modification or degradation can be considered harmful if it actually kills or injures wildlife by significantly impairing its essential behavioral patterns (e.g., breeding, feeding, sheltering). The Supreme Court has upheld that definition as a reasonable interpretation of the term that is supported by the broad purpose of the ESA to conserve listed species.

Questions have arisen as to whether NMFS also interprets harm to include habitat modification or destruction. Therefore, on May 1, 1998 [63 *Federal Register (FR)* 24148], NMFS proposed a rule to clarify that its interpretation of harm is consistent with (but not identical to) that of FWS. [In addition, on June 11 (63 *FR* 31962) NMFS announced the availability of and a request for comments on a draft Environmental Assessment on the proposed rule.] The minor differences between the NMFS' proposed rule and the FWS definition of harm are due to NMFS' focus on aquatic species as well as wildlife. For example, in addition to breeding, feeding, and sheltering, it includes spawning, rearing, and migrating as essential behavioral patterns that may be impaired. The *Federal Register* notice contains examples of habitat-modifying activities that may fall within the proposed definition of harm. It also discusses how the proposed rule relates to incidental take exceptions. Comments on the proposed rule were due June 30, 1998.

Listings Resume; Prioritization Guidance Issued

FYs 95 and 96: Public Law 104-6, effective April 10, 1995, mandated a moratorium, which lasted for more than a year, on the addition of new species to the list of threatened and endangered plants and animals. During that time, a backlog of 243 proposed listings accrued. When the moratorium was lifted, the available funds appropriated by Congress for FY 96 fell far short of what the FWS needed to clear away that backlog. Thus, on May 16, 1996, the FWS published a notice (61 *FR* 24722) describing how it would determine which proposals to finalize first. The listing priority guidance was effective upon publication and was to remain in effect for at least the rest of the fiscal year (i.e., until September 30, 1996).

FY 97: Since the funds appropriated for FY 97 were also not adequate to eliminate the backlog of proposed listings and complete all listing actions required by the ESA, the FWS on September 17, 1996 (61 *FR* 48962), extended the effectiveness of the May 1996 guidance, proposed to amend it for use during FY 97, and requested public comments on it. On December 5, 1996 (61 *FR* 64475), the FWS issued final guidance on assigning relative priorities to listing actions for FY 97.

For the first half of FY 97 first priority was placed on issuing final determinations. Effective April 1, 1997, the FWS implemented a more balanced listing program. Thus, the FWS used the following tiered approach for assigning relative priorities, on a descending basis, to listing actions: Tier 1, Emergency Listing Actions; Tier 2, Processing Final Decisions on Proposed Listings; Tier 3, Resolving the conservation status of candidate species and processing administrative findings on petitions to add species to the lists or reclassify threatened species to endangered status; and Tier 4, Processing critical habitat determinations and delistings or reclassifications.

FYs 98 and 99: On October 23, 1997, the FWS published a notice (62 *FR* 55268) extending the FY 97 listing priority guidance until the FY 98 appropriations bill for the Department of the Interior became law and new final listing guidance was published in the *Federal Register*.

On March 5, 1998 (63 *FR* 10931), the FWS announced proposed guidance to be followed in assigning relative priorities to listings during FY 98. It also announced its intention to follow the same guidance in FY 99, if sufficient funds were appropriate by Congress.

On May 8, 1998 (63 *FR* 25502), the FWS finalized its listing priority guidance for FYs 1998 and 1999. This guidance was effective on the date of publication in the *Federal Register* and will remain in effect until modified or terminated. This prioritization is necessary because serious backlogs still remain in the listing program.

Highest priority actions, Tier 1, will be processing emergency listings for species determined to face a significant and imminent risk to their well being. Second priority, Tier 2, will be finalizing already proposed listings; developing new listing proposals; processing administrative petition findings to add, delist, or reclassify species; and, to a limited extent, processing other delisting and reclassifying actions. Within Tier 2 final determinations on proposed rules will have the highest priority. Resolving the conservation status of candidate species and developing new listing proposals, when appropriate, will have the second highest priority in that tier. The next priority will be processing 90-day and 12-month petition findings to add species to the lists. The lowest priority within Tier 2 will be delistings and reclassifications; during FY 98 only a small number of these are expected. Finally, Tier 3, proposed or final designations of critical habitat, will have the lowest priority for FWS action.

Candidate Species Redefined

For species to receive the full protection accorded by the ESA, they must be placed on the List of Endangered and Threatened Wildlife and Plants. Since the FWS does not have the resources to immediately add all species that are in danger of extinction to that list, the FWS must prioritize the listing process, as discussed above, based on the level of threats the species face. To assist in this prioritization, the FWS maintains a list of what are termed *candidate species*. Candidate species are plants and animals native to the United States for which the FWS has sufficient information on biological vulnerability and threats to justify

proposing to add them to the threatened and endangered species list, but cannot do so immediately because other species have a higher priority for listing.

While candidate species have no statutory protection under the ESA, maintaining a list of such species serves a variety of purposes including:

- providing advance notice of potential listings to other agencies, individuals, and groups so they can determine how eventual listing might affect their plans;
- soliciting additional input to help the FWS determine if species should be added to or deleted from the candidate species list; and
- requesting information to assist the FWS in determining the order in which those taxa should be proposed for addition to the threatened and endangered species list.

On February 28, 1996 (61 *FR* 7595), the FWS issued a notice formally announcing a revised definition of “candidate” species and requesting public comments on it. The FWS considered all the comments received and published a final decision on December 5, 1996 (61 *FR* 64481).

Until the February 28, 1996, notice candidate species had been separated into three subcategories. Based on the new definition, only those species for which the FWS has sufficient information on file to support issuance of a proposed listing, the former Category 1 species, are considered candidates. The recent *Federal Register* notices describe the reason for this change and the FWS’s responses to the 163 comment letters it received. The information from the *Federal Register* notices is summarized below.

The species in category 3 were not actually considered to be candidate species. They were simply those taxa that once were considered for listing as threatened or endangered but which were no longer under such consideration because they were thought to be extinct, did not meet the ESA’s definition of “species,” had been found to be more abundant or widespread than previously believed, or were not subject to any identifiable threat. While designation of category 3 species is now discontinued, the FWS will retain all information about them for possible future use.

Category 2 candidate species were taxa for which the FWS had information indicating that protection under the ESA *might* be warranted but for which it did not have sufficient information to justify issuing a proposed rule to list them as threatened or endangered. Thus, further biological research and field study were needed to resolve their conservation status. Calling these species “candidates” had resulted in confusion about their status since the FWS never considered it likely that all category 2 species would eventually be listed as endangered and threatened species. Also, the credibility of the list was undermined by the variable quality of the information on the species and the fact that even with over 4,000 species on the list, it was likely a considerable under-representation of the species that warranted review. Finally, it is not practical for the FWS to attempt to keep track of all the species in the U.S. that *may* be imperiled. Thus, in order to clarify that the term “candidate species” only applies to those taxa that the FWS expects to propose for listing based on the available scientific information, the FWS no longer maintains a list of species designated as “category 2 candidates.”

The December 1996 notice referred to a number of other available lists that describe “species of concern” or “species in decline” which replace the former list of category 2 candidate species. Regarding these lists the FWS stated, “...the Service believes that these lists are more appropriate for use in land

management planning and natural resource conservation efforts that extend beyond the mandates of the Act.” Agencies and organizations that track species that may be declining include state natural resources agencies, The Nature Conservancy’s (TNC’s) Natural Heritage Programs, federal land-management agencies (e.g., the U.S. Forest Service, Bureau of Land Management, National Park Service), the Biological Resources Division of the U.S. Geological Survey, professional societies, and conservation organizations. Of these, the FWS identifies the Natural Heritage Central Database, developed by TNC and the network of State Natural Heritage programs, as the single most comprehensive source of available information on rare or imperiled species.

Under both section 7 consultations and section 10 incidental take permits, the FWS will continue to encourage the protection of candidate species and species of concern, even though the ESA does not mandate protection for either group. Thus, the FWS will continue to identify listed, proposed, and candidate species that may occur in or near the area of a proposed project and will refer requestors to other sources for information on other species of concern.

On September 19, 1997 (62 *FR* 49397), the FWS published a list of the 207 taxa that were then considered candidate species. That notice also included a list of those species that had been removed from candidate status since the 1996 candidate species list was issued on February 28, 1996 (61 *FR* 7595). Further, the FWS indicated that in the future such lists would be published annually. On April 2, 1998 (63 *FR* 16217), the FWS published a notice deleting four plant species from candidate status. Thus, there are currently 203 taxa that are listed as candidates by the FWS.

Recreational Fishing and Endangered Species

On June 7, 1995, President Clinton issued Executive Order (E.O.) 12962 on Recreational Fisheries. The issuance of this E.O. recognized the fact that most North American aquatic habitats have been significantly altered by human impacts. Habitat alteration and degradation, heavy fishing pressure, and introduction of non-native species have caused negative impacts to aquatic species and habitats. Thus, successful future management of the Nation’s aquatic resources must focus on an ecosystem approach that recognizes multiple uses of aquatic systems.

Section 4 of the E.O. requires all federal agencies to aggressively work to promote compatibility and reduce conflict between administration of the ESA and recreational fisheries. On June 3, 1996, the FWS and the NMFS published a final joint policy notice in the *Federal Register* (61 *FR* 27977), effective July 3, 1996, implementing that section of the E.O. The notice also summarized the comments received on the draft statement (December 13, 1995, 60 *FR* 64070) and the Services’ responses to them.

The new FWS/NMFS policy applies to all pertinent organizational elements of the two Services and includes all efforts funded, authorized, or carried out by them relative to recreational fisheries and implementation of the ESA. It affirms the Services’ intent to comply with the E.O. and describes how they will address the conservation needs of species listed, or proposed to be listed, under the ESA while providing and enhancing recreational fisheries opportunities.

Plans to implement the E.O. include cooperative partnerships with interested stakeholders such as other federal agencies; state, local, and Tribal governments; people interested in recreational fisheries; conservation organizations; and industry. Activities to implement the Services’ policy fall into four general areas:

- Increasing efforts with stakeholder groups to develop mutually acceptable goals and objectives;
- Encouraging participation by stakeholders in developing, implementing, and reviewing actions identified in recovery plans for listed species;
- Cooperating with stakeholders to help the public better understand the relationship between conservation and recovery of federally listed and proposed species and recreational fisheries; and
- Restoring and enhancing aquatic habitats to conserve listed and proposed species and increase recreational fishing opportunities consistent with the Services' missions, authorities, and initiatives.

For more information on any of these issues, contact Lois Thompson, EH-412, (202) 586-9581; mailing address: Office of Environmental Policy and Assistance, EH-412, US Department of Energy, 1000 Independence Avenue SW, Washington DC 20585-0119; email address: lois.thompson@eh.doe.gov; fax number (202) 586-3915.